

#14 HARMONIZE REPORTING REQUIREMENTS FOR TAXPAYERS SUBJECT TO BOTH FBAR AND FATCA BY ELIMINATING DUPLICATION AND EXCLUDING ACCOUNTS A U.S. PERSON MAINTAINS IN THE COUNTRY WHERE HE OR SHE IS A BONA FIDE RESIDENT

Present Law

The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as The Bank Secrecy Act) requires U.S. citizens and residents to report foreign accounts with an aggregate value of \$10,000 or more at any time during the calendar year on FinCEN Report 114, *Report of Foreign Bank and Financial Accounts* (FBAR).⁸¹

The Foreign Account Tax Compliance Act (FATCA)⁸² added IRC § 6038D, which requires U.S. citizens, resident aliens, and certain non-resident aliens to file Form 8938, *Statement of Specified Foreign Financial Assets*, with their federal income tax returns to report foreign assets exceeding specified thresholds. Under FATCA, IRC §§ 1471-1474, foreign financial institutions (FFIs) that do not register with the IRS and agree to report certain information about their U.S. accounts,⁸³ including the accounts of certain foreign entities with substantial U.S. owners, are subject to a 30 percent withholding tax on certain U.S. source payments they receive.

IRC § 1471(d)(1) authorizes the IRS to issue regulations to eliminate duplicative reporting requirements. IRC § 6038D similarly authorizes the IRS to issue regulations or other guidance to provide appropriate exceptions from FATCA reporting when such reporting would be duplicative of other disclosures.

Reasons for Change

Many U.S. taxpayers, particularly those living abroad, face increased compliance burdens and costs as a result of FATCA reporting obligations that significantly overlap with the FBAR filing requirements.⁸⁴ The IRS has exercised its regulatory authority to eliminate duplicative reporting of assets on Form 8938 if an asset is reported or reflected on certain other timely filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891).⁸⁵ It has also provided an exception from the reporting rules for financial accounts held in U.S. territories for *bona fide* residents of such territories.⁸⁶

However, the IRS has repeatedly declined to adopt the recommendations of the National Taxpayer Advocate, supported by other stakeholders, including the Government Accountability Office, to eliminate duplicative FATCA reporting where assets have already been reported on an FBAR,⁸⁷ and to provide a same-country exception for reporting financial accounts held in the country in which a U.S. taxpayer is a *bona fide* resident. The recommendations, if adopted, would reduce the compliance burdens on U.S. taxpayers, who now must file complex, additional forms themselves or pay higher tax return preparation fees, and on FFIs, some of whom are declining to do business with U.S. expatriates because of the significant costs and regulatory risks

81 See 31 U.S.C. § 5314(b)(3) and 31 C.F.R. § 1010.306(c).

82 Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

83 See IRC § 1471(d)(1) for a definition of “United States account.”

84 IRS, *Comparison of Form 8938 and FBAR Requirements*, <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>.

85 Treas. Reg. § 1.6038D-7(a)(1).

86 Treas. Reg. § 1.6038D-7(c).

87 See, *e.g.*, GAO, GAO-12-403, *Reporting Foreign Accounts to the IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified* (Feb. 2012).

associated with ongoing FATCA compliance. In addition, the unwillingness of certain FFIs to do business with U.S. expatriates makes it difficult for U.S. citizens to open bank accounts in some countries.

Recommendations

Amend IRC § 6038D to eliminate duplicative reporting of assets on Form 8938, *Statement of Specified Foreign Financial Assets*, if an asset is or has been reported or reflected on an FBAR and to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the specified foreign financial assets required to be reported on Form 8938.

Amend IRC § 1471 to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the definition of “financial account” subject to reporting by FFIs.⁸⁸

⁸⁸ For additional information on the National Taxpayer Advocate’s recommendations, see National Taxpayer Advocate 2015 Annual Report to Congress 353-363 (Legislative Recommendation: *Foreign Account Reporting: Eliminate Duplicative Reporting of Certain Foreign Financial Assets and Adopt a Same-Country Exception for Reporting Financial Assets Held in the Country in Which a U.S. Taxpayer Is a Bona Fide Resident*).